

**UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION**

In re: ) CHAPTER 7

WILLIAM BATTLE, JR., )

Debtor. )

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WILLIAM BATTLE, JR., )

Appellant, )

vs. )

MORTGAGE ELECTRONIC )  
REGISTRATION SYSTEMS, INC., )

Appellee. )

CASE NO. 04-98513-MGD

JUDGE DIEHL

**ORDER GRANTING EXTENSION OF TIME TO FILE DESIGNATED  
ITEMS ON APPEAL AND DENYING MOTION TO STAY  
JUDGMENT PENDING APPEAL**

This matter is before the Court on the Motion for Extension of Time to File Designated Items Subsequent to Notice of Appeal ("Motion for Extension") (Docket No. 17) filed by William Battle, Jr. ("Appellant") on January 13, 2005. Previously, on December 30, 2004, Appellant filed a Motion for Stay Pending Appeal ("Motion for Stay") (Docket No. 14). No response was filed by any party pertaining to either motion. The Court concludes that a hearing is not necessary to dispose of either of the motions and for the reasons set forth herein Appellant's Motion for Extension is **GRANTED** and Motion for Stay is **DENIED**.

Appellant *pro se* filed a petition under chapter 7 of the bankruptcy code on December 3, 2004. On the petition, in the designated space dedicated to the listing of prior bankruptcy petitions filed by the debtor within the previous six years, one case is listed by the Appellant: 04-

96658. On December 7, 2004, Mortgage Electronic Registration Systems, Inc. (“Appellee”), filed an emergency motion to lift the automatic stay to conduct a foreclosure sale. Appellee’s emergency motion states that it is the holder of a security deed describing real property in which Appellant asserts an ownership interest.<sup>1</sup> Appellee indicates that it had been advertising the subject property according to Georgia law in order to conduct a non-judicial foreclosure sale on the first Tuesday in December, and that Appellant has engaged in an abusive pattern of filing bankruptcy petitions on the eve of scheduled foreclosures with the intent of thwarting Appellee’s rights to foreclose.

In its emergency motion Appellee states that this is the fourth case filed by Appellant on the eve of a scheduled foreclosure. The first case, 03-81716-CRM was a chapter 13 case filed by William L. Battle, Jr. and Cynthia Battle on October 31, 2003. The chapter 13 plan was not confirmed by the Court and the case was dismissed pursuant to an order entered on January 21, 2004. The second case affecting the subject real property was filed April 6, 2004 by William Lee Battle. This chapter 13 case, 04-92853, was not prosecuted as a plan and schedules were never filed and the debtor never appeared at the scheduled section 341 meeting of creditors. An order dismissing the case with prejudice as to a future chapter 13 filing was entered on June 30, 2004. On September 7, 2004, William Battle filed a chapter 7 case, 04-96658. A notice of dismissal was entered on September 27, 2004, due to the fact that the debtor never paid his filing fee. The record reflects that the debtor’s schedules and statement of financial affairs were not filed in the case.

On December 7, 2004, the Court entered an order which granted Appellee’s motion seeking to conduct a foreclosure sale. The order directed Appellee not to execute, deliver or

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<sup>1</sup> The real property is located at 5136 Villas Terrace Circle, Stone Mountain, Georgia. This is shown to be the street address of the Debtor on his petition.

record its deed, or take any action to conclude the sale without further order from the Court.<sup>2</sup> On December 30, 2004, Appellant filed his notice of appeal of the order entered December 7<sup>th</sup>, and on January 13, 2005, Appellant filed the Motion addressed in this Order.

### **MOTION FOR EXTENSION OF TIME TO DESIGNATE ITEMS ON APPEAL**

While the bankruptcy judge loses jurisdiction over the subject matter of an appeal once the notice has been filed, limited power is retained by the judge concerning what items should be included in the designation of record. This includes the authority to grant or deny a motion for extension of time to file a designation of appeal record. *Schwinn Plan Committee v. AFS Cycle & Co., Ltd., et al (In re Schwinn Bicycle Co.)*, 204 B.R. 13, 16 (Bankr. N.D.Ill. 1997); *Brandt v. Carlson (In re Carlson)*, 247 B.R. 754, 756 (Bankr. N.D.Ill. 2000).

Rule 8006 of the Federal Rules of Bankruptcy Procedure provides that within 10 days after filing the notice of appeal the appellant shall file a designation of items to be included in the record on appeal and a statement of the issues to be presented. Appellant's request for an extension of time was filed January 13, 2005, more than 13 days after the entry of the notice of appeal. In his Motion, Appellant states that due to the "mail box rule" he is permitted to have an extension of time. This reveals a misunderstanding of the rule. The "mail box rule" or Fed. R. Civ. P. 6(e), is applicable in bankruptcy proceedings as 9006(f) of the Federal Rules of Bankruptcy Procedure. Fed. R. Bankr. P. 9006(f) states: "when there is a right or requirement to do some act or undertake some proceedings within a prescribed period after *service* of a notice or other paper and the notice or paper other than process is served by mail or under Rule 5(b)(2)(C) or (D) F.R.Civ. P., three days shall be added to the prescribed period." (emphasis added). The ten day period in which Appellant was to file his designated items included in the

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<sup>2</sup> Pursuant to the Court's direction, on December 16, 2004, Appellee filed a motion to validate the foreclosure sale which was conducted on December 7<sup>th</sup>.

appeal begins after the filing of the notice of appeal, not after the service of a notice.<sup>3</sup> *Williams v. EMC Mortgage Corp. (In re Williams)*, 216 F.3d 1295, 1297 n.3 (11<sup>th</sup> Cir. 2000) citing *Arbuckle v. First Nat'l Bank of Oxford (In re Arbuckle)*, 988 F.2d 29, 31 (5<sup>th</sup> Cir. 1993). As a result, Bankruptcy Rule 9006(f) does not apply to the situation at hand.

Courts are divided about the ramifications for a appellant not complying with the ten day requirement of Rule 8006. Some courts have found that dismissal is appropriate as a result of an appellant failing to timely perfect the record for the appeal. See *In re Duncan*, 95 B.R. 672 (Bankr. W.D.Mo. 1988); *In re Colombian Coffee Co.*, 71 B.R. 258 (S.D.Fla. 1987); *In re Webster*, 47 B.R. 1012 (M.D.N.C. 1985); *United States v. Dowell (In re Dowell)*, 95 B.R. 693 (Bankr. W.D.Mo. 1989). However, compliance with Rule 8006 is not jurisdictional and many courts have refused to dismiss an appeal for noncompliance with procedural, non-jurisdictional requirements in absence of bad faith or prejudice. *Pamaco Partnership Mgmt. Corp., et al. v. TMC Terraplan Mgmt. Corp.*, 158 B.R. 61, 65 (W.D.Va. 1993). See *In re Comer*, 716 F.2d 168 (3<sup>rd</sup> Cir. 1983); *In re Smith*, 119 B.R. 558 (S.D.Ohio 1989); and *In re Crisp*, 77 B.R. 215 (W.D.Mo. 1987).

Bankruptcy Rule 9006(b)(1)(2) provides that “on motion made after the expiration of the specified period [the court may] permit the act to be done where the failure to act was the result of excusable neglect.” In making the determination as to whether or not excusable neglect exists, the Court will consider all the relevant circumstances including: “the danger of prejudice to debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the

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<sup>3</sup> While Appellant does not raise the issue in his Motion, the Court finds it important to address whether weekends are included in the computation of the 10 days. Pursuant to Bankruptcy Rule 9006(a), due to the fact that the period of time prescribed to file the designated items for appeal was greater than eight days, weekends are included in the computation. The last day is included in the calculation unless it falls on a Saturday, Sunday or legal holiday. In this case the 10<sup>th</sup> day fell on Sunday, January 9<sup>th</sup>, so the time period was extended to Monday, January 10<sup>th</sup>.

movant acted in good faith.” *Envisionet Computer Services, Inc. v. ECS Funding LLC*, 288 B.R. 163, 164 (D.Maine 2002) citing *Pioneer Investment Services Co. v. Brunswick Associates Ltd.*, 507 U.S. 380, 395, 113 S.Ct. 1489, 1498, 123 L.Ed.2d 74 (1993). Debtor’s Motion for Extension does not provide any legitimate explanation for the failure to file the designated items in a timely manner, and the Motion for Extension itself was not filed timely.

Pursuant to Rule 8007(b) an appeal from a bankruptcy court judgment is not even docketed with the district court until a designation of the record is filed.<sup>4</sup> See *Brandt v. Carlson (In re Carlson)*, 247 B.R. 754, 756 (Bankr. N.D.Ill. 2000). The Court is concerned because this Debtor has demonstrated a consistent inability to follow the rules of the Court or to respect deadlines. This is apparently the fourth case filed by Debtor and in each of the cases, the Debtor has disregarded the bankruptcy rules and has failed to properly prosecute the case. Failure to timely designate the record for the appeal serves to delay the docketing with the District Court and prevents much needed finality to the matter.

However, failure to comply with Rule 8006 is not jurisdictional. The Court notes that Appellee did not file a response or objection to the Motion for Extension, and the Appellant filed the instant motion only on the thirteenth day after filing the notice of appeal. Finally, the Appellant is *pro se* and likely did not know about his responsibility to designate the items on appeal until he received the notification of appeal requirements served by the Clerk of the Court on January 6, 2005. While this does not provide an excuse for the Appellant, the Court does conclude that the failure to comply with the ten day requirement was not due to bad faith and will not serve to greatly prejudice Appellee. Accordingly, the Court finds it appropriate to provide a brief extension of time in which Appellant must file the designated items subject to the appeal.

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<sup>4</sup> Rule 8007(b) provides, in part:  
“When the record is complete for purposes of appeal, the clerk shall transmit a copy thereof forthwith to the clerk of the district court or the clerk of the bankruptcy appellate panel.”  
*Also see Jewelcor Inc. v. Asia Commercial Co., Ltd.* 11 F.3d 394, 397-98 (3<sup>rd</sup> Cir. 1993).

## MOTION FOR STAY PENDING APPEAL

Bankruptcy Rule 8005 which governs a stay pending appeal provides as follows:

A motion for a stay of the judgment, order, or decree of a bankruptcy judge, for approval of a supersedeas bond, or for other relief pending appeal must ordinarily be presented to the bankruptcy judge in the first instance. Notwithstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy judge may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest.

Fed. R. Bankr. P. 8007(b).

In order to obtain a stay pending appeal, the appellant must show (1) there is a likelihood of success on the merits; (2) there will be irreparable harm to the debtor if no stay is granted; (3) there is a lack of substantial harm to the creditor if there is a stay; and (4) the relief requested is not contrary to the public interest. *Piedmont Associates v. Cigna Property & Casualty Insurance Co.*, 132 B.R. 75, 76 (N.D.Ga. 1991). “A motion for stay pending appeal is an extraordinary remedy and requires a substantial showing on the part of the [m]ovant.” *In re Lickman*, 301 B.R. 739, 742 (Bankr.M.D.Fla. 2003). The movant, who has the burden of proof, must show satisfactory evidence on all four criteria and the failure to satisfy one element is fatal to the motion. *In re Blizerian*, 264 B.R. 726, 729 (Bankr. M.D.Fla. 2001).

Appellant’s Motion for Stay merely states that he is entitled to a stay of proceedings pursuant to the federal rules of appellant procedure. (Motion to Stay, ¶ 2). Appellant cites no specific rule nor does he state any law which would support a stay of the proceedings.

In determining that a stay pending appeal is not warranted in this case the Court need not address whether Appellant satisfies all four criteria since the Court concludes that there is no likelihood of success on the merits. Rule 8002(a) of the Federal Rules of Bankruptcy Procedure

provides that a notice of appeal must be filed “within 10 days of the date of the entry of the judgment, order, or decree appealed from.” Appellant’s notice of appeal was filed on December 30, 2004, and the date of the entry of the order he seeks appellate review of was entered December 7, 2004. Therefore, Appellant’s notice of appeal appears to be out of time and is subject to dismissal by the District Court. In *Williams*, the 11<sup>th</sup> Circuit reaffirmed the United States Supreme Court’s position that the requirement of an appellant timely filing of a notice of appeal is mandatory and jurisdictional. 216 F.3d. at 1298 *citing Advanced Estimating System, Inc. v. Riney*, 77 F.3d 1322, 1323 (11<sup>th</sup> Cir. 1996). Importantly the deadline for filing the notice of appeal as provided by Rule 8002(a) is jurisdictional and this is in direct contrast to the requirements of Rule 8006 discussed above, which provides for the perfection of the record on appeal. However, this is a subject to be ultimately addressed by the District Court as the undersigned bankruptcy judge lacks the jurisdiction to dismiss this appeal. *Schwinn Plan Committee*, 204 B.R. at 16. Accordingly, it is

**ORDERED** that Appellant’s Motion for Extension is hereby **GRANTED**. Appellant shall have through and including Monday, February 7, 2005 to designate the items to be included in the record on appeal and to otherwise fully comply with the requirements of Rule 8006 of the Federal Rules of Bankruptcy Procedure.

**IT IS FURTHER ORDERED** that Appellant’s Motion for Stay is hereby **DENIED**.

The Clerk is directed to serve a copy of this Order on the attached distribution list.

**IT IS SO ORDERED.**

At Atlanta, Georgia, this the 31<sup>st</sup> day of January, 2005.

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MARY GRACE DIEHL  
UNITED STATES BANKRUPTCY COURT





**DISTRIBUTION LIST**

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